

THE FEDERAL TRADE COMMISSION

The recent tendency to create branches of the government exercising legislative, executive and judicial powers, but independent of each of the three grand divisions, is most marked. The powers of such bodies are frequently termed administrative, yet no one has seen fit to properly and completely define the term in its modern signification. The earliest Federal body of importance exercising such powers was the Interstate Commerce Commission. One of the important functions of that tribunal is acting for the public in matters in which the individual may have little concern or in which individual interest may be too small to warrant proper activity; similarly, the particular matter may be of such magnitude that the individual feels he cannot cope with the powerful yet erring adversary.¹ The necessity for an authorized body to act for the public, because either an individual is not sufficiently affected or the matter of so great magnitude or the alleged violator so powerful as to make individual action unprofitable, and mayhap impolitic,² is the cornerstone of the many Commissions now existing in the Federal and State governments. While these bodies care for the public interests and often proceed on their own initiative, individual action is not prohibited; in truth, it is invited. The most recent creature of the Congress is the Federal Trade Commission.³ To this body is confided the care and protection of the interests of the public in matters of trade and commerce, other than transportation and banking.

The first official recommendation to secure the results now sought to be achieved through the Federal Trade Commission seems to have been in the Preliminary Report of the Industrial Commission in 1900, as follows:

“The larger corporations—the so-called trusts—should be required to publish annually a properly audited report showing in reasonable detail their assets and liabilities, with profit and loss; such reports and audit under oath

¹Equity early took jurisdiction of cases making similar allegations; see *Adams Equity*, p. 30.

²In the past, and even to some extent to date, shippers refrain from proceeding against carriers fearing that retaliatory measures will be taken.

³An Act to create a Federal Trade Commission, to define its powers and duties and for other purposes, approved September 26, 1914.

to be subject to Government inspection. The purpose of such publicity is to encourage competition when profits become excessive, thus protecting consumers against too high prices and to guard the interests of employees by a knowledge of the financial condition of the business in which they are employed."

The recommendation of a bureau to have definite power over corporations engaged in interstate and foreign commerce was incorporated in the Final Report of the Commission (Vol. 19, pp. 650-651, 1902):

"That there be created in the Treasury Department a permanent bureau the duties of which shall be to register all State corporations engaged in interstate or foreign commerce; to secure from such corporations all reports needed to enable the Government to levy a franchise tax with certainty and justice, and to collect the same; to make such inspection and examination of the business and accounts of such corporations as will guarantee the completeness and accuracy of the information needed to ascertain whether such corporations are observing the conditions prescribed in the act and to enforce penalties against delinquents; and to collate and publish information regarding such combinations and the industries in which they may be engaged, so as to furnish to the Congress proper information for possible future legislation.

"The publicity secured by the governmental agency should be such as will prevent the deception of the public through secrecy in the organization and management of industrial combinations or through false information. Such agency would also have at its command the best sources of information regarding special privileges or discriminations, of whatever nature, by which industrial combinations secure monopoly or become dangerous to the public welfare. It is probable that the provisions herein recommended will be sufficient to remove most of the abuses which have arisen in connection with industrial combinations. The remedies suggested may be employed with little or no danger to industrial prosperity and with the certainty of securing information which should enable Congress to protect the public by further legislation if necessary."

A step towards what was suggested and has now been accomplished was the creation of the Bureau of Corporations by Act February 14, 1903 (32 Stat. at Large, 828).

In view of the passage of an Act providing for the Federal Trade Commission at the present session of the Congress, excerpts

from the platforms of the chief political parties are interesting. Each will, no doubt, claim credit for the legislation.⁴

The present majority party declared:

"A private monopoly is indefensible and intolerable. We therefore favor the vigorous enforcement of the criminal as well as the civil law against trusts and trust officials, and demand the enactment of such additional legislation as may be necessary to make it impossible for a private monopoly to exist in the United States.

"We favor the declaration by law of the conditions upon which corporations shall be permitted to engage in interstate trade, including among others, the prevention of holding companies, of interlocking directors, of stock-watering, of discrimination in price, and the control by any one corporation of so large a proportion of any industry as to make it a menace to competitive conditions.

"We condemn the action of the Republican administration in compromising with the Standard Oil company and the tobacco trust, and its failure to invoke the criminal provisions of the anti-trust law against the officers of these corporations after the court had declared that from the undisputed facts in the record, they had violated the criminal provisions of the law.

"We regret that the Sherman anti-trust law has received a judicial construction depriving it of much of its efficacy, and we favor the enactment of legislation which will restore to the statute the strength of which it has been deprived by such interpretation."

The Republican National Convention had the following declaration in its last platform:

"In the enforcement and administration of Federal laws governing interstate commerce and enterprises impressed with a public use engaged therein, there is much that may be committed to a Federal trade commission, thus placing in the hands of an administrative board many of the functions now necessarily exercised by the courts. This will promote promptness in the administration of the laws and avoid delays and technicalities incident to court procedure."

⁴Credit for creating the Commission has already been claimed by the majority party in an article by Senator Newlands in the October (1914) *Review of Reviews*. Party differences seem to require that members of the two other parties shall charge that the powers given the Commission are not broad enough and that the proposed legislation in respect to trusts falls far short of meeting the demands of the majority platform and the public.

The Progressive Platform of 1912 read:

"To that end [Protection against Trusts and Monopolies] we urge the establishment of a strong Federal administrative commission of high standing, which shall maintain permanent active supervision over industrial corporations engaged in interstate commerce, or such of them as are of public importance, doing for them what the Government now does for the national banks, and what is now done for the railroads by the Interstate Commerce Commission."

In the address of President Wilson to the Congress January 20, 1914, after referring to the uncertain meaning of the anti-trust laws and the desire of business men to have definite guidance and information which could be supplied by an administrative body, he said:

"The opinion of the country would instantly approve of such a commission [Interstate Trade Commission]. It would not wish to see it empowered to make terms with monopoly or in any sort to assume control of business, as if the Government made itself responsible. It demands such a commission only as an indispensable instrument of information and publicity, as a clearing house for the facts by which both the public mind and the managers of great business undertakings should be guided, and as an instrumentality for doing justice to business where the processes of the courts or the natural forces of correction outside the courts are inadequate to adjust the remedy to the wrong in a way that will meet all the equities and circumstances of the case."

There can be no doubt that these words of the Executive were the stimulus to action, the proximate cause of the passage of the Act of September 26, 1914. Diverse views as to the powers, jurisdiction and authority of the Commission existed in each of the houses and between the two houses. The differing plans are interesting to the student of legislative history; as, however, the Commission has been created, the practitioner and the public are more concerned about its present powers and duties than the past conflicting plans for its creation, its jurisdiction, powers and duties.

The Commission, which it is expected will begin its duties about January, 1915, is largely modeled after the Interstate Commerce Commission, as originally created. There are five Commissioners (with annual salaries of \$10,000 each) to be appointed

by the President for terms of seven years, the first appointees to serve three, four, five, six and seven years. The legal qualification for service is that one shall not engage in any other business, vocation or employment; commissioners may be removed by the President for inefficiency, neglect of duty or malfeasance in office. Not more than three of the commissioners shall belong to the same political party. Provision is made for a seal, a secretary, clerks, experts, attorneys, examiners and other employees; the last mentioned must be appointed under the rules to be prescribed by the Commission and the Civil Service Commission; authority for expenses and renting suitable quarters is conferred. The abolishing of the Bureau of Corporations being directed, the employees thereof are transferred to the Commission. The principal office of the Commission is to be at Washington but it may sit elsewhere when desired.

The Commission is given power to issue subpoenas, administer oaths and require the attendance of witnesses and production of documents by application to any court of the United States which may punish as a contempt, or, if a district court, may issue writs of mandamus. The Commission and its agents are given power at all reasonable times to have access to, for examination with right to copy, any documentary evidence of any party proceeded against.

Service by the Commission of complaints, orders and process may be personal, by leaving copy at the principal office or by registered mail, the return of each of which is made proof of service.

The immunity provision of the act is that no one shall be excused from testifying or producing documentary evidence on the ground of tendency to incrimination or subjection to penalty or forfeiture, but no natural person is to be prosecuted in respect to such evidence, except for perjury.

The penalties of the act may be summarized as follows: (a) Refusal to attend, testify and produce documentary evidence, fine or imprisonment or both; (b) Wilful making or causing to be made false entry or statement of fact in a report to the Commission, or wilful neglect to make correct accounts, or wilful removal out of jurisdiction, or mutilation or alteration of documentary evidence, or wilful refusal to exhibit and permit taking copies of the same, fine or imprisonment or both; failure to file required reports after 30 days notice subjects the offending corporation

to suit for forfeiture of \$100.00 per day; the divulging of information without authority of the Commission or direction of the court, fine and imprisonment or both.

None of the provisions of the act are to interfere with the enforcement of the interstate commerce or anti-trust acts, nor is the act to be construed as altering, modifying or repealing either of the same.

That there may be no doubt of the meaning of certain terms the act definitely provides therefor. "Commerce" means commerce among the several States or with foreign nations, or in any Territory of the United States or in the District of Columbia, or between any such Territory and another, or between any such Territory and any State or foreign nation, or between the District of Columbia and any State or Territory or foreign nation.⁵

"Corporation" means any company or association, incorporated or unincorporated, which is organized to carry on business for profit and has shares of capital or capital stock, and any company or association, incorporated or unincorporated, without shares of capital or capital stock, except partnerships, which is organized to carry on business for its own profit or that of its members.⁶

"Documentary evidence" means all documents, papers, and correspondence in existence at and after the passage of this act.⁷

The anti-trust acts and acts to regulate commerce are described by reference.⁸

⁵ This definition was inserted in the bill by the conferees; the original bill (H. R. 15,613) and the amendment by the Senate said: "'Commerce' means such commerce as Congress has the power to regulate under the Constitution."

⁶ The House Bill read: "'Corporation' means a body incorporated under law, and also joint stock associations and all other associations having shares of capital or capital stock or organized to carry on business with a view to profit." The Senate amendment read: "The term 'corporation' or 'corporations' shall include joint stock associations and all other associations having shares of capital or capital stock, organized to carry on business for profit."

⁷ This definition is from the House Bill.

⁸ Act July 2, 1890: Secs. 73 to 77, inclusive, Act August 27, 1894, and Act February 12, 1913, amending said sections. In the Act to supplement existing laws against unlawful restraints and monopolies, the term "Anti-trust Acts" is made to include the three acts just mentioned and the supplemental Act. The Interstate Commerce Act is Act of February 4, 1887, as amended.

The authority conferred on the Commission falls under the following heads:

- I. Continuation of pending investigations and proceedings of the Bureau of Corporations.
- II. Respecting "unfair methods of competition."
- III. Securing of information concerning corporations engaged in interstate commerce, including information in the possession of other departments and bureaus of the Government; and certain investigations.
- IV. Acting as Master in Chancery, in certain instances.
- V. Enforcement of certain provisions of the Supplemental Anti-trust Act.⁹

I. The matters now pending in the Bureau of Corporations, and which unless completed prior to the organization of the Commission, will be transferred to the Commission, include investigations into the lumber, tobacco, fertilizer, agricultural implement and beet sugar industries, also certain investigations at the request of the Senate; there is also being conducted inquiries concerning resale price maintenance, conflict of State foreign corporation laws, efficiency of trusts, and trust legislation and proposed reforms and remedies.

II. The prohibition of the Statute is against "unfair methods of competition," which are declared unlawful.¹⁰ What method in commerce shall fall within or without the legislative prohibition is left in the first instance to the Commission. The reason for failure to define "unfair methods" appears in the Conference Report, Statement of the Managers on the part of the House, as follows:

"It is impossible to frame definitions which embrace all unfair practices. There is no limit to human inventiveness in this field. Even if all known unfair practices were specifically defined and prohibited, it would be at once necessary to begin over again. If Congress were to adopt the method of definition, it would undertake an endless task. It is also practically impossible to define unfair practices so that the definition will fit business of every

⁹ At this writing, October 12, 1914, this Act has not as yet received the approval of the President.

¹⁰ Sec. 5. "That unfair methods of competition in commerce are hereby declared unlawful."

sort in every part of this country. Whether competition is unfair or not generally depends upon the surrounding circumstances of the particular case. What is harmful under certain circumstances may be beneficial under different circumstances."

The Senate report on the bill referred to "unfair competition" as follows:

"One of the most important provisions of the bill is that which declares unfair competition in commerce to be unlawful, and empowers the commission to prevent corporations from using unfair methods of competition in commerce by orders issued after hearing, restraining, and prohibiting unfair methods of competition, which orders are enforceable in the courts.

"The committee gave careful consideration to the question as to whether it would attempt to define the many and variable unfair practices which prevail in commerce and to forbid their continuance, or whether it would, by a general declaration condemning unfair practices, leave it to the commission to determine what practices were unfair. It concluded that the latter course would be the better, for the reason, * * * that there were too many unfair practices to define, and after writing 20 of them into the law it would be quite possible to invent others.

* * * * *

"It is believed that the term 'unfair competition' has a legal significance¹¹ which can be enforced by the commission and the courts, and that it is no more difficult to determine what is unfair competition than it is to determine what is a reasonable rate or what is an unjust discrimination."

A recent writer, Wm. S. Stevens, classifies unfair competition in the *Political Science Quarterly*¹² under the following heads:

I. Local price-cutting; II. Operation of bogus "independent" concerns; III. Maintenance of "fighting ships" and "fighting brands"; IV. Lease, sale, purchase or use of certain articles as a condition of the lease, sale, purchase or use of other required

¹¹ Notwithstanding this expression by the Senate Committee, the business man and the practitioner will necessarily have great difficulty, particularly in advance of numerous decisions by the Commission, to determine what constitutes "unfair methods of competition"; so also, whether or not a given method falls within or without the prohibition.

¹² Vol. XXIX, Nos. 2 and 3; June and September, 1914.

articles; V. Exclusive sales and purchase arrangements; VI. Rebates and preferential contracts; VII. Acquisition of exclusive or dominant control of machinery or goods used in the manufacturing process; VIII. Manipulation; IX. Blacklists, boycotts, white-lists, etc.; X. Espionage and use of detectives; XI. Coercion, threats and intimidation.

It is noteworthy that in the hearings before the Senate and House on the bill there appears no complaint of any of the matters stated by Mr. Stevens, except brief references to the heads numbered IV, V, and VI. The chief objections were made against purchasers rubbing together the heads of sellers in attempt to jew on prices, cut-rate stores, "unfair practices," not specifically designated or described, "big business" because big and "so large as to be vested with a public interest," and supposed lack of public information respecting large concerns, their conduct of business and their financial condition.

Whatever may ultimately be determined to be "unfair methods of competition in commerce," the act empowers and directs the Commission to prevent the use thereof. Whenever the Commission has reason to believe¹³ that such methods are being used and that a proceeding would be to the interest of the public, it is authorized to issue and serve a complaint, stating the charges and notice of hearing to be held not less than 30 days after service. The party proceeded against shall appear and show cause why an order should not be entered requiring him to cease and desist from the violation charged. Interventions with right to counsel are permitted for good cause shown. The testimony at the hearing is to be reduced to writing and filed in the office of the Commission.

If, after the hearing, the Commission is of opinion that the method complained of is prohibited by the Act, it is to make a

¹³ The Act does not state what evidence must be presented to the Commission in order that they may have "reason to believe" that unfair methods of competition are being used. It would therefore seem that the Commission may either act in particular cases as it sees fit or by general rule prescribe the manner in which one aggrieved may call to the attention of the Commission the methods used by a competitor. Formerly, it was required by the Interstate Commerce Commission that complaints should be under oath; this practice no longer prevails. The Trade Commission Act does not specifically authorize the filing of a complaint by one aggrieved. It seems permissible for one to state to the Commission a set of facts and ask it to proceed by complaint against the alleged offender.

report in writing stating the facts¹⁴ and serve an order requiring the ceasing and desisting from such method. Until the transcript of record is filed in court, the Commission has power to modify or set aside its report and order.

Should the party against whom an order is directed, fail or neglect to obey it, application¹⁵ may be made by the Commission to the Circuit Court of Appeals within the district where the method of competition was used for its enforcement. Upon such application the commission is to certify and file a transcript of the entire record¹⁶ before it, including the testimony and the report and order.

Upon filing the application and transcript the court is to serve the party, whereupon it has "jurisdiction of the proceeding and of the question determined therein, and * * * power to make and enter upon the pleadings, testimony, and proceedings * * * a decree affirming, modifying or setting aside the order of the Commission." Either the Commission or the party against whom the order is directed may adduce evidence in court upon showing that the additional evidence is material and that there are reasonable grounds for failure to give the evidence before the Commission. When such additional evidence has been taken, the Commission may modify its findings as to fact, or make new

¹⁴This provision probably requires the separate finding of the several facts in each proceeding. The Interstate Commerce Act does not require that Commission to state the facts separately but does require that "it shall be its duty to make a report in writing in respect thereto [investigation], which shall state the conclusions of the Commission, together with its decision, order, or requirement in the premises; and in case damages are awarded such report shall include the findings of fact on which the award is made" (Act to Regulate Commerce, Sec. 14).

¹⁵The original Act to regulate commerce provided and the present Act still provides that an order of the Commission may be enforced by the court upon application of the Commission; similarly an order may be set aside upon application of the carrier against which the order runs. Applications by the Commission to the court have not been frequent since the Act of June 29, 1906, because failure to obey an order of the Commission subjects one to certain penalties; the effect of this provision is to make the orders self executing.

¹⁶The record of a proceeding before the Interstate Commerce Commission is not by the Act made a part of the record in the court. In practice, one attacks the order issued by the Commission, and the record before the Commission, in whole or in part, is introduced in evidence before the court.

findings and make a recommendation for modification or setting aside its original order.¹⁷

As the Commission may proceed in the Circuit Court of Appeals for enforcement of its order, so the party proceeded against may petition the same court for an order to set aside the Commission's order with the same jurisdiction and same procedure as is provided when the Commission invokes the power of the court.

Whether the power of the court be invoked by the Commission or the party against whom the order is issued, the findings of the Commission as to the facts, if supported by testimony, is conclusive.¹⁸

The jurisdiction of the Circuit Court of Appeals in respect to orders of the Commission is exclusive and such cases are to be given precedence and expedited in every way. The judgment and decree of the Circuit Court of Appeals is final, except by certiorari to the Supreme Court.

No order of the Commission or judgment of the court is to relieve or absolve one from liability under the Anti-trust Acts.

III. Under this heading the Commission has power to:

(a) Gather and compile information concerning, and investigate the organization, business, conduct, practices, and management of those engaged in interstate and foreign commerce, except banks and common carriers.

(b) To require from those mentioned annual or special reports, or both, and answers in writing under oath to specific questions concerning the same matters as it may gather and compile information.

(c) To make investigations on its own initiative concerning the manner in which a decree seeking to prevent a violation of the anti-trust laws is being carried out. In this behalf, the Commission is to transmit a report embodying its findings and

¹⁷ The Interstate Commerce Act contains no provision for the taking of additional evidence before the court; nor, if such evidence be taken, permitting the Commission to modify its order after consideration thereof and prior to the decision by the court. The order of the Interstate Commerce Commission must stand or fall upon the record made before it and the court. Provisions similar to those in the Federal Trade Commission Act are to be found in the Acts creating the Public Service Commission of Maryland and Railroad Commission of Wisconsin.

¹⁸ This provision is substantially in accord with the decisions of the Supreme Court of the United States in respect to orders of the Interstate Commerce Commission; see, for example, *I. C. C. vs. U. P. R. Co.*, 222 U. S. 541, at 547.

recommendations to the Attorney General, which report the Commission in its discretion may make public.

(d) At the direction of the House or Senate to investigate and report the facts concerning alleged violations of the anti-trust laws.

(e) On application of the Attorney General to investigate and make recommendations for the readjustment of the business of those violating the anti-trust laws that they may thereafter act in accordance with law.

(f) To make public the information obtained, except trade secrets and names of customers, if deemed in the public interest; also to make annual reports to the Congress with recommendation for additional legislation.

(g) To classify corporations and make rules and regulations to carry out the provisions of the act.

(h) To investigate trade conditions in foreign countries, where trade associations or other conditions may affect the foreign trade of the United States, report the results to the Congress with such recommendations as it may deem advisable.

IV. The Commission is authorized, if the court desire, to act as Master in Chancery in suits brought by the Attorney General for the enforcement of the anti-trust laws, to ascertain and report an appropriate form of decree. After notice and hearing the Commission is to report the form of decree to the court, which may adopt or reject the report in whole or in part, entering such decree as it may deem appropriate.

V. To the Commission is confided the authority¹⁹ to enforce certain provisions of an "act to supplement existing laws against unlawful restraints and monopolies."

This act makes it unlawful for one engaged in commerce either directly or indirectly to discriminate in price between different purchasers within the United States where the effect of discrimination is to substantially lessen competition or tend to create a monopoly; difference in price, however, may be made on account of grade, quality, or quantity, or cost of selling or if made in good faith to meet competition. The act also makes it unlawful for one to lease or make a sale or contract for sale of goods, wares, merchandise, machinery, supplies or other commodities, whether patented or unpatented, or fix a price therefor with the under-

¹⁹ The authority referred to has not as yet been granted, as the act mentioned has not been approved; see Note 9, *supra*.

standing that the lessee or purchaser does not use or deal in articles from competitors, where the effect of the lease or sale may be to substantially lessen competition or tend to create a monopoly.

The act further prohibits acquisition of capital stock by one corporation of other corporations where the effect thereof is to lessen competition between the two corporations or restrain commerce in any section or community or tends to create a monopoly; these provisions do not apply to the purchase of stock of another corporation solely for investment, nor to the formation of subsidiary corporations.

The method of procedure before and by the Commission to enforce the foregoing provisions are substantially the same as those prescribed in respect to "Unfair Methods of Competition" as in the Federal Trade Commission Act.

It is not within the scope of this article to point out the several constitutional questions with which the act is pregnant and which, it would seem, must necessarily arise. What particular questions shall be taken to the courts will depend upon the action of the Commission; if it shall proceed cautiously and prudently, there may arise no test of the powers contained in the language of the act. Its inquisitorial powers have already been questioned by many; so long as these powers are exercised in no more objectionable manner than the similar powers of the Bureau of Corporations, no test will probably be made. Thus far, that branch of the Government has never been called upon to exercise the full power given.

The success of the Commission as a part of our government cannot be safely predicted, notwithstanding the opinion of its sponsors. There has been no such demand, no such hearings and argument as preceded the creation of the Interstate Commerce Commission, or for that matter, which preceded the authority to enforce its judgment as to the reasonableness of rates. The general public are not now informed of the creation of the Federal Trade Commission. Whether its acts shall ultimately be approved will depend upon the measure of conservatism of the new arm for the investigation of business, of the new aid to enforce the anti-trust laws; and also, whether the public desire a code of morals in business matters and constructive legislation in respect to economics.

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